No. 14,505

IN THE

United States Court of Appeals

For the Ninth Circuit

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,

Appellant,

vs.

FIDALGO ISLAND PACKING CO.,

Appellee,

CLARA WILSON,

Intervenor.

BRIEF FOR APPELLEE.

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STATEMENT.

Appellant, in his brief, has made a statement of the procedural steps taken in this case in the lower Court, and of that Court's findings; but, for the purpose of aiding this Court at the outset in its consideration of the Record, we submit the following:

This action involves the Alaska Employment Security Law. That law is found in Volume 2, Alaska Compiled Laws Annotated 1949, Sections 51-5-1 to 55-5-20. There were certain amendments made to the law in the years 1949, 1951 and 1953. The title of the

law was changed by Chapter 53 of the Session Laws of Alaska 1949 to the Employment Security Law, and the name of the Commission was changed to the Employment Security Commission of Alaska. We are concerned here with those amendments to the law appearing in Chapters 82, 83 and 99 of the Session Laws of Alaska 1953, and particularly with Section 7 of Chapter 99. (App. A, B and C, pp. i-vii.)

The Commission set up originally by Section 51-1-10 ACLA 1949 consisted of three members. However, Chapter 82 of the SLA 1953 repealed this entire section, 51-1-10 ACLA 1949, and Chapter 83 of the SLA 1953 created a new Commission, consisting of four members. It is conceded that the old Commission was abolished and out of existence and the new Commission had been created by Chapter 83, SLA 1953, at all times during the acts complained of in the complaint of plaintiff and intervenor. (R. 56.)

Then the Legislature in 1953 passed Chapter 99, SLA 1953, making certain amendments to the Employment Security Law of Alaska. These amendments make certain important changes in Sections 51-5-1, 51-5-2, 51-5-3, 51-5-4, 51-5-16, ACLA 1949. (App. C.)

While the old Commission was in existence, for a time Mr. John T. McLaughlin was acting as Executive Director of the Commission; that is, the old Commission. He continued on to act as Executive Director after the old Commission was abolished, and on June 29, 1953, he promulgated a purported Regulation of the Commission known as Amended Regula-

tion No. 10, declaring the salmon industry in Alaska to be a seasonal industry under the provisions of subdivision (c) (1), Section 51-5-2 ACLA 1949, which section had been expressly amended by the provisions of Section 7 of Chapter 99, SLA 1949.

This action was brought by the plaintiff and the intervenor to enjoin the enforcement of Amended Regulation No. 10 as being in violation of Section 7, Chapter 99, SLA 1953, which was the law in effect at the time the pretended Amended Regulation No. 10 was promulgated by McLaughlin. The plaintiff alleged in its complaint that it was engaged in fishing, canning, packing and shipment of canned salmon in Alaska and that it was a member of the Alaska Salmon Industry, Inc., an organization composed of various packers of canned salmon in Alaska, and plaintiff brought the action on its own behalf and on behalf of the Alaska Salmon Industry, Inc., and all its members and all those engaged in the packing of canned salmon in Alaska. (R. 3-4.) The intervenor, Clara Wilson, in her complaint alleged that she was an employee of the Taku Fisheries, Inc., working in the cannery of the Taku Fisheries, Inc., at Juneau, and she realleged and adopted all the allegations of plaintiff's complaint and made them a part of her complaint in intervention by reference thereto, thereby adopting the allegation that the action was brought on behalf of all those engaged in the packing of canned salmon in Alaska. (R. 17.)

After a hearing, a preliminary injunction was entered against the defendant on August 17, 1953. The

case was pending for some time and during its pendency the defendant McLaughlin was replaced as Executive Director by A. B. Phillips, and he was substituted as defendant in place of McLaughlin. (R. 45.) The case was tried before the Court at Juneau on April 27, 1954, and thereafter on April 29, 1954, further proceedings were had before the Court in chambers, and again on May 3, 1954, in open court the defendant made certain offers of further proof which were rejected by the Court.

The Court rendered its opinion on May 7, 1954 (R. 42-54), and on May 12, 1954, entered findings of fact, conclusions of law and a decree permanently enjoining the defendant from enforcing the provisions of purported Amended Regulation No. 10, dated June 29, 1953 (R. 55-67), and holding that purported Regulation to be invalid for reasons stated in the findings and opinion.

Section 51-5-2 ACLA 1949, in subdivision (c), defines seasonal employment as follows:

> "(c) Seasonal employment.
>
> (1) As used in this subsection the term 'seasonal industry' means an occupation or industry in which, because of the seasonal nature thereof it is customary to operate only during a regularly recurring period or periods of less than one year in length. * * *"

For a number of years the old Commission by regulation declared certain industries to be seasonal because of climatic conditions and the shortness of the seasons during which certain occupations can be

carried on. Those industries which were classified as seasonal included placer mining, whaling, herring meal, oil and saltery industry, lighterage and salmon canning. (R. 121-123.) All these industries were dropped except salmon canning, apparently in 1952. (R. 121.)

Salmon canning in Alaska is carried on, of course, only during the period in the summer months when the fish run, and the seasons vary in different districts from Bristol Bay to the Canadian boundary in Southeastern Alaska.

In carrying on the salmon canning operations thousands of employees are employed during the brief fishing and canning season. A large number of these must necessarily be brought from the states of Washington, Oregon and California, and probably half of them are permanent residents of Alaska. Many of these of course are natives. Some of the workers must necessarily be employed for longer periods than others. For instance, machinists, carpenters, Filipino crew and many others, most of whom come from the States, must come some weeks before the actual canning season, and many workers must remain after the actual canning season is over. Some of these are employed for as long as three or four months, while some of the natives and residents of Alaska who are engaged only for the actual fishing and packing period, which may be only three or four weeks, obtain only that much employment. (R. 87-92.) One of the charges in the complaint and the complaint in intervention is that this pretended Amended Regulation No. 10, in

addition to being made in violation of Section 7, Chapter 99, SLA 1953, in that it classifies industries as such instead of "seasonal employers", was discrimination between these resident employees who are employed only during the actual fishing and packing season in the cannery and those nonresident employees who are also employed in the cannery during the actual canning operations, and in employment incidental to the actual canning operations before the fish are packed and after the fish are packed, thereby placing them in a nonseasonal category, as we shall see hereafter.

For a number of years the old Commission, which had the power then to classify industries as such, established two seasons for cannery employees, namely one called the "long season" and one called the "short season". Then this was changed and only one season was established, which, of course, varied from district to district. The old Commission apparently discussed the necessity for a change in the law, and what is now Chapter 99 was considered by the old Commission and that part of it which defined an employer "as a seasonal employer, an employer taking or processing raw or natural products". The Legislature dropped the phrase "taking or processing raw or natural products" (R. 117) and passed Chapter 99, SLA 1953, which applies seasonality not to industries but to employers and employing units, according to a certain formula.

The plaintiff and intervenor sought and obtained the injunction on the ground that the Acting Director

had no authority to promulgate pretended Amended Regulation No. 10 because of the following reasons:

1. The authority to promulgate such a regulation rested in the Commission and could not be delegated, even if the old Commission had remained in authority or the new Commission had attempted to delegate it.

2. The amended regulation is in violation of Section 7, Chapter 99, SLA 1953, in that it attempts to classify "industries" and not "employers and employing units".

3. The pretended Amended Regulation No. 10 discriminates between different classes of employees engaged in the same work during the same season.

4. The regulation is discriminatory as between seasonal employers in the salmon packing industry and seasonal employers in the construction and other industries who have been classified as nonseasonal.

Plaintiff and intervenor further claimed in seeking the injunction that the application and enforcement of purported Amended Regulation No. 10 will irreparably injure them and all other employers and employees "engaged in the packing of canned salmon in Alaska".

The appellant contended that:

1. The regulation was not void because Acting Director McLaughlin, who attempted to promulgate the regulation at a time after the old Commission had been abolished, was acting under authority delegated to him by the old Commission in November, 1938 (R. 161), and that he still had power to promulgate a reg-

ulation regulating industries, notwithstanding the fact that at the time of the attempted regulation Section 7 of Chapter 99, SLA 1953, was in full force and effect, which section changed the law with reference to classification of seasonal employers.

2. The appellant and intervenor had no standing in Court because they had not first exhausted their administrative remedies by appealing to the Commission from the order of the Acting Director promulgating Amended Regulation No. 10, and

3. The appellee and intervenor have not been irreparably injured.

QUESTIONS PRESENTED.

The questions presented on this appeal are as follows:

1. Did Acting Director McLaughlin have power and authority to promulgate and enforce pretended Amended Regulation No. 10?

2. Was plaintiff required to seek administrative remedies, if any existed, before bringing action in the District Court, which question involves the power of the Court to hear and determine the case?

3. Would the appellee, intervenor and those other employers and employees whom they represented have been irreparably injured by the enforcement of pretended Amended Regulation No. 10?

The questions set up by appellant at page 3 of his brief are merged in the three questions above set forth.

ARGUMENT.

We shall discuss the questions presented in the order in which they are set forth hereinabove.

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1. DID ACTING DIRECTOR McLAUGHLIN HAVE POWER AND AUTHORITY TO PROMULGATE AND ENFORCE PRETENDED AMENDED REGULATION NO. 10.

The appellant contends that under the authority of subsection (d) of Section 51-5-11, ACLA 1949, the Commission is given authority to appoint, fix the compensation and prescribe the duties and powers of such officers, accountants, attorneys, experts, etc., as may be necessary in the performance of its duties. That subsection contains the following language:

> "The Commission may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this Act * * *"

In November, 1938, the old Commission granted power to the Director

> "To make rules and regulations when the Commission is not in session. * * * Such rules and regulations are to be in effect in the regular pro-

cedure until such time that the Commission, at their next meeting, either approves or disapproves such rules and regulations." (R. 161-162.)

The lower Court held that:

"The determination of seasonality was neither delegated nor intended to be delegated." (R. 50.)

We do not think that where the Commission is charged in the law with the duty of making determination as to seasonality each year, such authority can be delegated, and we do not think that is what was meant by the action of the old Board in November, 1938. What was meant was that the Director was vested with administrative powers only when the Board was not in session and not with the quasi-judicial powers which had been conferred on the Board by law.

We know in these days many governmental functions are carried on through means of boards and commissions which, because of the increasingly complex nature of our civilization, are necessary. Very often these boards are given, in addition to certain administrative powers, quasi-judicial powers, but surely these quasi-judicial powers cannot be delegated to an employee of a board or commission.

The Board of Education, for instance, has certain powers which are quasi-judicial. It also has administrative powers. It may delegate certain powers to the Commissioner of Education, who is the executive official of the Board, but it certainly could not be said that the Commissioner of Education between sessions of the Board could promulgate and enforce a regula-

tion which would reduce the school year from nine months to two months, or reduce or increase the salaries of teachers, nor could the Board delegate him any such power, although the Board itself possesses that power. It may as well be contended that the Board of Education will have the power to delegate that authority to the janitor.

The lower Court says further in its opinion:

> "An examination of the law discloses that the determination of seasonality is not only one of the many important functions of the Commission, but also one that must be performed before the law can become fully operative. It is not conceivable that the exercise of this function would be delegated." (R. 50.)

Furthermore, there is nothing in the Record to show that any such power had been theretofore delegated to or attempted to be exercised by any Director of the Employment Security Commission.

There is another reason why the Acting Director, McLaughlin, could have no such authority, and that is that even if the authority had been granted him by the old Board to promulgate regulations, which had the effect of law and which had such an important bearing on the whole Employment Security program, the power and authority surely expired with the abolition of the old Commission.

A new law was in effect on June 29, 1953, and that new law provides an entirely new definition of seasonal employer and it sets forth in Section 7, subdivision (c) (1), Chapter 99, SLA 1953, a new defini-

tion and a formula for an exact determination of a seasonal employer. It further provides that:

> "No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission."

This refers to the new Commission which had been created by Chapter 83, SLA 1953. Section 7 above quoted went into effect on April 1, 1953.

Furthermore, if the Acting Director, in promulgating Amended Regulation No. 10, had the power to promulgate it under the old law and under the authority of the old Commission, he still had not complied with the former law, for that law, in Section 51-5-2, ACLA 1949, subdivision (c)(1), provides for investigation and hearing before a determination is made. Therefore, the Acting Director is on very shaky ground when he assumes authority alone for promulgating or attempting to promulgate pretended Amended Regulation No. 10, for if he had the power to act under the authority of the old law, notwithstanding its repeal, he had not given any notice or held any hearing to determine seasonality. If he was assuming to act under the new law, Chapter 99, SLA 1953, he did not act in conformity with the provisions of that law, which places seasonality on an employer instead of an industry basis, and no authority whatsoever could have been delegated by the new Board which did not organize until August 6, 1953 (R. 46), and after organization they did not even appoint Mr. McLaughlin, Executive Director. (R. 175, 189.)

Surely the regulation was void by any test that may be applied.

The present law in plain language specified that seasonality should be on an employer basis and not on an industry basis, and it set up a formula as a basis of classification for all employers. It is significant that Section 7, Chapter 99, went into effect on April 1, 1953, while the remainder of the Act did not become effective until July 5. The reason for this was to give the employees of the Commission three months' additional time in which to make computations under the formula before the end of the benefit year.

The trial Court, in its opinion (R. 46-50), sets forth very clearly the lack of power of McLaughlin to promulgate the attempted regulation.

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2. WAS PLAINTIFF REQUIRED TO SEEK ADMINISTRATIVE REMEDIES, IF ANY EXISTED, BEFORE BRINGING ACTION IN THE DISTRICT COURT, WHICH QUESTION INVOLVES THE POWER OF THE COURT TO HEAR AND DETERMINE THE CASE.

Appellant contends that plaintiff and intervenor had no standing in Court to attack the pretended Amended Regulation No. 10 until they had first taken an appeal to the Commission. Appellant argued this point in his application for summary judgment. (R. 79-85.) There is inserted in the Record, pages 76 to 86, the argument of appellant on this application; but the argument of plaintiff and intervenor is absent. So also there has been omitted the remarks of the Court at the conclusion of that argument, and

the Court's ruling on the motion for summary judgment.

The trial Court disposes of this question of the exhaustion of administrative remedies in its opinion (R. 49-52), saying among other things:

> "* * * Moreover, even had the time not expired, it would seem wrong to require the plaintiff to exhaust his remedy by way of an appeal in a case in which it would appear that under no circumstances could the regulation ultimately be upheld. Indeed, the very nature of the problems presented poses the question whether the remedy is not judicial, rather than administrative, to which the doctrine of the exhaustion of remedies would not apply. In view of the circumstances of this case, I am of the opinion that the doctrine should not be applied. 39 Cornell Law Quarterly 285; Gonzales v. Williams, 192 U.S. 1; U. S. ex rel. DeLucia v. O'Donovan, 178 F. 2d 876; Public Utilities Commission v. Gas Company, 317 U.S. 456; Breiner v. Wallin, 79 F. Supp. 506, 507-8. * * *"

There are additional reasons why no exhaustion of administrative remedies was involved in this case; reasons not mentioned in the trial Court's opinion. We shall briefly discuss those reasons. First: the Amended Regulation was void and made by one without power or authority to make it. There was a new Commission appointed. It had no connection with McLaughlin. So far as the pretended Regulation goes, it may as well have been made by a man in the street, and if so made and attempted to be enforced, no appeal need be taken to any Commission and the

Courts had full power to enjoin the enforcement, where that enforcement was threatened and would result in irreparable injury to anyone. McLaughlin had not been appointed Director or Acting Director by the new Commission, which was already in existence on June 25, 1953, or by its members. He has never been appointed. The law abolishing the old Commission and the law creating the new Commission both became effective June 25, 1953. (R. 56.) McLaughlin's pretended Amended Regulation No. 10 is dated June 29, 1953. Suppose an appeal to the Commission had been attempted. What would have been the result? It would have been this: the Commission would say: "We know not McLaughlin. We never authorized him to promulgate regulations. It is not a regulation or determination of the Commission, as the law requires. It is a nullity. We have no concern with it. We are not authorized to hear any appeal. This is an invalid act, committed by an unauthorized person, and it is a matter entirely for the courts to decide."

Second: the law made no provision for any such appeals. Let us see what the law does say about appeals. In the first place, the law, Section 7, Chapter 99, SLA 1953, imposes the duty upon the Commission, and not anyone else, of determining seasonality. In fact, it says: "No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission." There is no doubt that if the Commission has made a determination, it may then designate to some executive officer

the duty of constructing a regulation in accordance with the determination of the Commission, but that is not what was done. Now, as to appeals, we find that provision in the fourth paragraph of subdivision (2) of Section 7. We find this language:

> "Within fifteen days after the date of mailing or handing such written declaration, the employer or other interested party *may* appeal from such determination." (Emphasis ours.)

This section regarding appeal refers throughout to the *determination* of the Commission, and that is the determination the Commission is required to make under the provisions of subdivision (c)(1) of Section 7.

It is plain, therefore, that the appeal mentioned in Section 7 is an appeal to correct an error in the determination of the Commission or at most, to correct, modify or set aside a regulation erroneously promulgated and claimed to be based on the determination of the Commission. Surely it does not refer to an appeal in the case of one who attempts to promulgate a regulation without authority, and who has absolutely no power to make any determination.

It will be noted that the provisions for appeal are that an employer or other interested party *may* appeal from such determination. It would, therefore, appear to be optional and even if what was involved here had been a regulation of the Commission itself, we do not think the law would require any appeal before seeking the aid of a Court, except

at the option of the employer or other party interested.

We will concede that if the Commission had made a determination as required by Section 7, and had then appointed McLaughlin Director and then delegated to him the authority to promulgate a regulation in accordance with the determination of the Commission and he had made errors or exceeded the bounds of the determination of the Commission, then we would have the right of appeal, but not even then would we have to appeal if time were an element.

The authorities cited by appellant are not in point. Typical is the case of *Myer v. Bethlehem Ship Building Co.,* 303 U.S. 41, where plaintiff sought to enjoin a hearing by the National Labor Relations Board. There was involved in that case no action amounting to the exercise of quasi-judicial powers of one without authority. What the plaintiff in that case was attempting to do was enjoin the National Labor Relations Board from holding a hearing. The Court held that certain administrative steps were provided by law and that these must be followed, and that the law, having given the Board no power to enforce its orders, required a hearing in Court ultimately so that the plaintiff's rights were fully protected.

We think the result in that case would have been quite different had some unauthorized board or executive officer without power attempted to hold a hearing and make a determination affecting plaintiff's rights which would result in irreparable injury. All

the cases cited by appellant in his brief may be distinguished for the same reason.

Here we do not seek to enjoin any step of the Commission, but the enforcement of a regulation made by one without authority, clearly contrary to law and void on its face.

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3. WOULD PLAINTIFF AND INTERVENOR AND THOSE WHOM THEY REPRESENT BE IRREPARABLY INJURED BY THE ENFORCEMENT OF PRETENDED AMENDED REGULATION NO. 10.

The theory of the Employment Security law is, and its purpose always should be, to set up a fund to pay persons who are unemployed through no fault of their own. For that purpose the employer pays 3% into the fund. A small part of this goes for administration purposes, and the remainder for benefits. If plaintiff is obliged to pay into this fund any amount of money which, under some regulation such as the one in question, may not be credited to plaintiff for the purpose for which it was paid in, plaintiff has been irreparably injured. The Court knows that the law sets up a certain system of experience rating credits and each employer is rated according to his experience in the matter of employment. If his payroll is steady and does not fluctuate, he is in a higher class than if he has a fluctuating payroll. In the administration of the law an attempt is, or should be, made to build up a surplus, and when it goes beyond a certain point, employers receive credits

according to their experience rating. That is the theory of the law.

The Employment Security Fund is insurance. The employer pays his contributions of 3%, which are in the nature of insurance premiums. He insures the employment of his employees to a certain extent, in accordance with the provisions of the law, by the payment of these premiums. If he does not get the protection, that is to say the insurance which he has purchased for his employees on an equal basis with other employers, he is irreparably injured. The amount of the premium, namely 3%, is fixed for all employers and all are required to pay that amount into the fund, so that each employer has an interest in the fund and in its administration and in the disbursements of benefits, for if the fund is not administered according to law, if it is wasted and if the surplus is exhausted, not only is there no hope of getting experience rating credits, but the employers are faced with paying much heavier contributions in the nature of insurance premiums.

We wish to call the Court's attention to the fact that plaintiff brought this action not only on its own behalf but on behalf of the Alaska Salmon Industry, Inc., which is an organization composed of various packers of canned salmon in the Territory, but it also brought it on behalf of "all those engaged in the packing of canned salmon in Alaska". (R. 3-4.) The plaintiff is an employer, one of the employers required to pay the contributions or insurance premiums. The intervenor, Clara Wilson, is an em-

ployee and her complaint in intervention adopts and realleges all the allegations of plaintiff's complaint and makes them a part of her complaint by reference thereto. (R. 17.) Therefore, the intervenor also brings the action on behalf of all employers and all employees in the canned salmon industry, so that an injunction should be granted if any of them are irreparably injured and have no plain, speedy and adequate remedy, save through a court of equity.

The definition of "irreparable injury" is quite simple, and Courts have been concerned with it so often that it seems unnecessary to cite a large number of authorities. It is generally understood to mean that equity jurisdiction attaches whenever an award of damages in a court of law would be inadequate to redress an injury suffered.

It is a flexible doctrine which hinges on the facts of each case. *Fox v. Krug,* 70 Fed. Supp. 721.

Bouvier's Law Dictionary contains the following definition:

> "Irreparable Injury. As a ground for injunction, it is that which cannot be repaired, retrieved, put back again, atoned for. 28 Fla. 387; it does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great; 142 Ill. 104. See Injunction. Injury of such nature that the party wronged cannot be adequately compensated in damages, or when the damages which may result cannot be measured by any certain pecuniary standard. Anderson; 39 Wis. 164. All that is meant is, that the injury would be a

> grievous one, or at least a material one, and not adequately reparable in damages. The term does not mean that there must be no physical possibility of repairing the injury. Id.; 76 Va. 306. The word 'Irreparable' is unhappily chosen to express the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages estimable only by conjecture and not by an accurate standard. Id.; 24 Pa. 160. In the sense in which used in conferring jurisdiction upon courts of equity, does not necessarily mean that the injury complained of is incapable of being measured by a pecuniary standard. Id.; 58 Mich. 485. Literally, anything is irreparable injury which cannot be restored in specie. In law nothing is irreparable which can be fully compensated in damages. To entitle a party to an injunction, he must show that the injury complained of is irreparable because the law affords no adequate remedy. Id.; 35 Pitts. Leg. J. 406."

Appellant says that the harms feared by the appellees are merely speculative and conjectural. It is the element of speculation which makes an injunction especially applicable to a case of this nature.

In the case of *Columbia College of Music v. Tunberg,* 116 P. 280, an injunction was issued against a music teacher to enforce a contractual agreement not to teach music in competition with the college. The objection was raised that plaintiff had not shown the loss of any pupils on account of defendant's competition in teaching music. In disposing of that contention, the Supreme Court of Washington said:

"His continued effort may succeed. To prevent wrong is the peculiar province of equity. His conduct has been such, and promises to be of such character, that damages may result. If so, they would be irreparable in the sense that they could be estimated only by conjecture and not by any accurate standard." 116 P. 280, 282.

See, also:

Crouch v. Central Labor Council, 293 P. 729 (Ore. 1930);

Bethel Methodist Episcopal Church v. Greenville, 45 S.E. 2d 841 (S. Car. 1947);

Kirk v. Watson, 4 S.E. 2d 13 (S. Car. 1939).

In the last mentioned case, an injunction was sought to restrain the County Treasurer from diverting tax monies raised for the purpose of paying interest on bonds. The Court found an irreparable injury in that the value of the bonds held by the plaintiff was being diminished by the diversion of these funds to improper uses. On this point, the Court said:

"As pointed out by appellant, whether a wrong is irreparable in the sense that equity may intervene and whether there is an adequate remedy at law for a wrong, are questions that are not decided by narrow and artificial rules. The courts proceed realistically, if the threatened wrong involves actual damage; the mere uncertainty of fixing the measure of such damage to the injured party may itself be sufficient to justify the exercise of equitable jurisdiction; and if the available legal remedy in a given case reduces itself to a matter of words rather than

to a matter of efficacy because of its impracticability or because the threatened acts may continue during the progress of an action at law, or because successive actions at law would be necessary to protect plaintiff's rights, equity will hold that the existence of the legal remedy is not an obstacle to the exertion of the equitable power."

The law becomes a part of every contract of hire. The question of whether employees in the same industry are covered by unemployment insurance to an equal extent affects all wage negotiations. Under Amended Regulation No. 10 we have some local employees who work only during the actual canning season, that is, while the fish are being put in the cans, and whose unemployment compensation, if any, is restricted to that brief period during the following year, while others who work alongside these same employees in the canneries in other work in connection with canning, are employed for three or four months, and, therefore, they become non-seasonal for this reason: subsection (5) of Section 7, Chapter 99, SLA 1953, reads as follows:

"Seasonal Worker. 'Seasonal worker' means an individual who has base period wage credits of which at least eighty percentum have been ~~carried~~ EARNED in seasonal employment."

It will be seen from a reading of this section that the seasonal workers are those who earn at least eighty per cent of their wages during the season fixed by the Commission. If they earn twenty percent outside that season, they become non-seasonal. Therefore,

when the season is fixed as it was attempted to be by Amended Regulation No. 10, to correspond with the actual fishing season permitted by the Fish & Wildlife Service in the various districts, those employees who must work in and about the cannery in preparations weeks before the actual fishing season, and must work for some time thereafter, are therefore non-seasonal, because more than twenty percent of their entire wages is earned outside the season as arbitrarily fixed by the pretended regulation. (See testimony of Peter F. Gilmore, R. 88-91 and 100-101.)

The Record shows that the seasons attempted to be fixed in purported Amended Regulation No. 10 correspond with the open fishing seasons as fixed by the U. S. Fish & Wildlife Service, but as a matter of fact, the Fish & Wildlife Service is given the power under the law and exercises the power each year to change the season of actual fishing from day to day, if necessary, according to the state of the fish run, and it is changed and frequently completely closed in certain areas before the date previously fixed, and sometimes extended.

Therefore, we see that the Filipinos, mechanics and others working in the cannery and working side by side with the native women and others residents for the same purpose, are in a non-seasonal class, while the natives and residents are classified as seasonal because of the eighty-twenty rule.

Plaintiff and others whom it represents are paying premiums or contributions on all employees alike, and the employees in one class are fully covered and

in the other class only partially so. Plaintiff is further injured by the fact that it contributes the same amount to the fund as all other employers outside the salmon canning industry, and that their contributions fully cover their employees the year around, while plaintiff's contributions cover only a part of its employees and the remainder is used to pay employees of others, whose employment is also seasonal, but who have been classified as non-seasonal. (Findings 7 and 12, R. 58, 60.)

Appellant contends that plaintiff and others could not be irreparably injured and would not have the right to maintain this suit, and he cites certain cases, typical of which are the following:

Sheldon v. Griffin, 174 F. 2d 382 (9th Circuit);
Hess v. Mullaney, 213 F. 2d 635 (9th Circuit);
Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571.

However, these cases are readily distinguishable from the case at bar. In the case of *Sheldon v. Griffin,* supra, the plaintiff had brought a suit to declare an act of the Legislature invalid. This act was an amendment to the Unemployment Compensation Law. He alleged in his complaint that he was a citizen and taxpayer and nothing more. He was not classified as either an employer or an employee, and he neither contributed to the fund nor received benefits from it. The Court held that he did not have a sufficient interest in the fund to complain of the law.

In the case of *Hess v. Mullaney,* supra, this Court held that a taxpayer who suffered no harm from the lack of a general Territorial Board of Equalization

was in no position to attack the validity of a property tax.

In the case of *Jeffrey Mfg. Co. v. Blagg,* supra, the Court held that an employer cannot object to a discrimination which affected employees only. These propositions of law are elementary, but are not in point here.

This is not a case attacking the validity of a tax paid by all taxpayers alike. It is not a suit to enjoin the imposition of a tax on all alike, but it is a contribution to a specially ear-marked fund. This is an insurance fund set up by employers for a certain purpose, with far-reaching effects. The disposition of the fund affects the rate of contributions, because of the experience rating provisions which are in the Alaska law, and in the law of practically every State in the Union. It affects wage contracts and seriously affects them if one class of employees is covered and another is not covered. The depletion of the fund is of paramount interest to all contributors, because when it reaches a certain point, there is no salvation except to make larger contributions, and the Record abundantly shows that was what was facing the plaintiff and others similarly situated in this case. The plaintiff has a sufficient interest in the disposition of the fund to restrain unlawful and improper uses to which the fund is put. We think this case is governed by the decision of the U. S. Supreme Court in the case of *U. S. v. Butler,* 297 U. S. 1. In that case, it was held that one who pays a tax levied for a specific purpose, as distinguished from a tax to obtain general revenue,

has standing to question the validity of the purpose for which the money is to be expended. We can find no cases which reason otherwise. In fact, this case is much stronger than the *Butler* case, because the contributions involved are not what is commonly known as a tax, but are contributions or premiums to an insurance fund. We think in this case, as one who is obliged under the law to support a special system of governmental regulation, as we have here an insurance system—a system designed to benefit both employer and employee—the appellee is certainly vested with a sufficient interest to call into question the conduct of officials charged with administering the fund. To hold otherwise is to place appellee and others interested at the mercy of capricious waste and misapplication of the monies which are exacted under the law, only because they are to be used for prescribed and limited purposes.

Plaintiff further complained that the regulation is discriminatory, because other employers, notably in the construction industry, whose work is also seasonal, are classified as non-seasonal and that these non-seasonal workers enjoy benefits at all seasons of the year when out of work and are rapidly depleting the surplus fund which plaintiff has assisted in building up through the years. The lower Court found from the evidence that the fund had decreased from $11,264,-484.74 in 1948 to $4,380,000.00 on April 24, 1954, although the total taxable payroll in 1953 was the highest in the Territory's history. (Findings 15-16, R. 61-62.)

Appellant has contended throughout this case and now contends that the plaintiff cannot be injured, for if benefit Regulation No. 10 is invalid, this will result in declaring all employees in the salmon canning industry to be non-seasonal, along with all other employees in every other industry and calling in Alaska, and in paying more money out of the fund for that reason, and that this would further deplete the fund and injure and not benefit plaintiff. However, the plaintiff has been paying into the fund its insurance premiums on its employees for years. If all this money is being paid out to non-seasonal workers and the fund is approaching bankruptcy, plaintiff has the right to see that before the fund is completely exhausted its employees get their just share on the same basis as all other seasonal workers who have been drawing so heavily on the surplus because classified as non-seasonal. The plaintiff has paid the insurance premiums into the fund for years for the purpose of giving its employees certain unemployment insurance benefits, and we do not think it should be required to sit idly by and see all of these contributions paid out to others, leaving them with no protection for the future. The trial Court disposed of this contention in its opinion in the following language:

> "The defendant argues that, if the regulation is invalidated, the unemployment compensation fund will be more quickly exhausted because of the necessity of paying benefits to cannery wokers on a par with nonseasonal workers. It requires no perspicacity to see that if one entitled to a share of a common fund foregoes his right there-

> to the process of depletion will be retarded. Aside from the fact that such an argument can have no appeal to a court of equity, it is wholly irrelevant. The paramount objective of the court is justice. The depletion of the fund is of no concern to the court except as it may shed light upon the contentions of the parties. It may not be amiss, however, to point out that, apparently, the defendant is concerned with depletion only if the process is accelerated by according the same rights to the plaintiff and the intervenor as all others engaged in seasonal activities receive."

We have been discussing the position and the rights of the plaintiff, Fidalgo Island Packing Company. However, there is more involved in the case than the rights of plaintiff. We think from what we have said and from the decisions cited, the plaintiff had the right to maintain this action and that it was in danger of being irreparably injured by the threatened enforcement of benefit Regulation No. 10, but plaintiff brought this suit on behalf of itself, other employers, and also on behalf of

> "all those engaged in the packing of canned salmon in Alaska." (R. 3-4.)

That is the allegation of plaintiff's complaint, and again in paragraph 8 it is alleged that defendant is

> "threatening to enforce Regulation No. 10 against the plaintiff and apply its provisions to the plaintiff, its employees and workers, and all other persons and corporations engaged in canning salmon in Alaska, and all their workers and employees, and the enforcement thereof will result

in a great irreparable harm and damage to the plaintiff and all others similarly situated and to all their employees and workers, and cause plaintiff and all others similarly situated and all those engaged in the salmon canning industry to change and adjust their seasons of employment, with consequent increased unnecessary expense, the exact amount of which cannot be determined but which varies from time to time in each area affected and with each separate employer and the employees thereof."

Plaintiff made no objection to this pleading by motion or otherwise.

It will be seen, therefore, that throughout the complaint the plaintiff contended that it had brought this suit on behalf of itself, other cannery owners and operators, and all employees.

This matter of discrimination was called to the attention of Mr. McLaughlin, the author of the regulation and the one who was threatening to enforce it, while he was on the witness stand, and his testimony shows the following:

"Q. * * * Now, let's take some of these natives—Indian women, who keep house, and young children that work in the canneries in the summertime and don't have any employment anywhere else during the year. How are they benefited by this regulation? Isn't that where your discrimination comes in?

"A. I wouldn't call it discrimination, Mr. Faulkner. It is their custom to work only during that period. They are actually the seasonal people that this regulation pertains to."

Mrs. Wilson, the intervenor, is a cannery employee, and she brought her action on behalf of all those engaged in the packing of canned salmon in Alaska, because she realleged all the allegations of plaintiff's complaint. She was an employee and alleged that the seasons set in the pretended Regulation No. 10 were not the true or actual salmon canning seasons in the Juneau area. (R. 16.) Her complaint in intervention (R. 16) and the regulation itself (R. 10) extend the season only to October 3, 1953, whereas she was employed until October 10, 1953. (R. 16.) It is true that during the benefit year and after the canning season was over she was obliged to secure other employment in a laundry and, therefore, took herself out of the seasonal class, but her complaint and the regulation show that the seasons fixed in the regulation were not the actual canning seasons, and for the reason hereinabove stated, this is true in other districts, for these seasons fluctuate from time to time with the orders of the Fish & Wildlife Service. Therefore, Mrs. Wilson's complaint embraces all employees in the salmon canning industry within the areas affected by the regulation.

Plaintiff's complaint (R. 13) alleges

> "That no other seasonal employers in Alaska have been classified as seasonal, and plaintiff has been discriminated against by that fact."

This is a clear discrimination and an injury to plaintiff and one which is irreparable and can never be repaired. In fact, great and irreparable harm has already been done to plaintiff. It was not only

threatened, but it had actually happened before the trial of the case.

The Record shows, and the Court found, that the construction industry in most of the Territory is seasonal. Plaintiff introduced plaintiff's Exhibit No. 2, which is the annual report of the Employment Security Commission for the year 1953. On Table IX there is set up a record showing the covered employment in Alaska by major industry groups for the fiscal year 1953, beginning with July, 1952, and ending with June, 1953. This table itself shows the nature of the construction industry. It also shows the record of salmon canning. The highest employment in salmon packing was in July, 1952, and it was 13,680. The lowest employment was in January, with 624. In the construction industry the employment was higher. It was 15,709 in July, and this was reduced to 3,818 in February, and 3,948 in January.

The construction industry is largely in the business of building roads, bridges, airfields, buildings, etc.; and it is highly seasonal in all areas except Southeastern Alaska. The Court will note that the highest employment in this industry is from June to October. From the very nature of the industry itself and the climatic conditions in Alaska, it is a matter of common knowledge that this industry in the Interior and Western Alaska is one which cannot be operated during the extreme weather of the winter. You cannot pour concrete or construct roads or excavate or build bridges during periods of extreme cold, ranging from ten or twelve degrees below zero to fifty below, with

deep snow conditions in some places during the winter months.

The Court in its written opinion said:

> "* * * it would take judicial notice of the fact that outside construction work in the Territory, except in Ketchikan and vicinity, is limited by weather to the period from May to October, and is, therefore, seasonal in fact." (R. 44-45.)

Appellant complains of this and seems to feel that the Court had no right to take judicial notice of this fact, and he recites three material requisites that must be met in order to authorize judicial notice. These are that the matter must be one of common and general knowledge; it must be well and authoritatively settled and not doubtful and uncertain; and it must be known to be within the judicial limits of the Court.

I think the Court's action in this respect could be based upon all these three factors, for they were certainly present. It is certainly a matter of common and general knowledge everywhere that you cannot construct bridges, excavate ground, pour concrete and erect buildings in Western and Interior Alaska during the winter months. There is nothing doubtful or uncertain about that. It is within the limits of the jurisdiction of the Court. It is a matter of such common and general knowledge that it would be almost an insult to the intelligence of any person living in Alaska to urge otherwise, and this is especially so of Judge Folta, who holds court more than half the time in the Anchorage area.

But whether the Court took judicial notice of this fact or not is beside the point, for the Record bears out the fact of the seasonality of the construction industry, or at least a large portion of it, and most of that portion outside the Ketchikan area, where a very extensive construction operation was actually carried on during the winter months here under discussion, so that it is safe to say a large part of those workers who were shown by Table IX to have been employed during the winter were actually employed in the Ketchikan area.

We think even this Court would be entitled to take judicial notice of this fact from simply reading the newspapers and weather reports.

Counsel has inserted in the Record, pp. 224-263, a long statement made by Larry Moore, Manager of the Alaska Chapter of the Associated General Contractors. This statement was read at a public hearing of the Employment Security Commission of Alaska on October 27 and 28, 1953.

Mr. Moore's employers, the Associated General Contractors, are the ones who are responsible for the depletion of the Alaska fund, by reason of the fact that all employees of the contractors in the construction industry have been treated as non-seasonal and draw benefits the year around when out of employment.

We think Mr. Moore's remarks are of very little value to the Court, for it is not what any one person said one way or the other at a public hearing with

which we are concerned, but what the Commission and the executive officers did, and with what result.

Counsel did not insert in the Record, and he did not introduce in evidence, any of the many statements made in opposition to Mr. Moore at this public hearing. It will be observed that Mr. Moore was desperately urging that his employers be continued as non-seasonal despite the express mandate of Section 7, Chapter 99 of the SLA 1953. It is the employees of these employers who come to Alaska by the thousands during the summer months and then return to their homes in forty-one States of the Union and draw large sums in benefits from the Alaska fund. (See Table XIV, plaintiff's Exhibit 2.) This table will show the large payments which went out from the Alaska fund in 1952 and 1953 to these very seasonal workers who had been declared non-seasonal by the defendant. The payments range from $860,199 in the State of Washington to $2,492 in the State of Georgia, with residents of such states as Minnesota drawing as much as $129,-289. Even the State of Idaho came in for something over $37,000, and Wisconsin for nearly $25,000.

This is a class action, and it is brought under Rule No. 23 of the Federal Rules of Civil Procedure. The plaintiff and others similarly situated, and its and their employees, and all those employees represented by intervenor, had certainly a common interest in this fund, and we think it is governed by the case of *Culver v. Bell & Loffland,* 146 F. 2d 29 (U. S. Court of Appeals, 9th Circuit, 1945.)

Before closing, we wish to point out certain features about the appendices in appellant's brief. In Appendix B, page iv, he inserts Section 55-5-2 ACLA 1949, but this section was repealed by Chapter 99 of the SLA 1953. Then he sets up Section 51-5-7 ACLA 1949, referring to appeals under the old law, but the reference set up in this appendix refers to appeals in cases of claims for benefits.

In Appendix C, page vi, he sets up a portion of Chapter 4, SLA 1937, Extraordinary Session, which deals with seasonal employment. However, this was all changed by Chapter 99, SLA 1953. Then, in Appendix D, page vii, he sets up a portion of Chapter 1 of the SLA 1939, referring to seasonal industry. Again this was changed by Chapter 99, SLA 1953. Then, in Appendix E on page viii, he sets up a copy of Chapter 82, SLA 1953, but immediately following, and without any separation therefrom, he sets up Section 51-5-10 ACLA 1949. This continues on to pp. ix and x. This material is no part of Chapter 82 and it was all repealed by Chapter 99, SLA 1953.

CONCLUSION.

From the foregoing, we submit:

1. That the pretended Amended Regulation No. 10 of the defendant is invalid and void.

2. That the action was properly brought in the District Court and no other steps were required.

3. That the plaintiff, intervenor and all others whom they represent, both employers and employees, have been irreparably injured.

We respectfully submit that the judgment of the District Court should be affirmed.

Dated, Juneau, Alaska,
March 7, 1955.

FAULKNER, BANFIELD & BOOCHEVER,
H. L. FAULKNER,
Attorneys for Appellee, and Intervenor.

(Appendices A, B and C Follow.)

Appendices.

Appendix A

CHAPTER 82, SESSION LAWS OF ALASKA, 1953

AN ACT

(H. B. 128)

To repeal Subsection (a), paragraphs (1), (2) and (3), and Subsections (b) and (c) of Section 51-5-10, Alaska Compiled Laws Annotated 1949, as amended by Chapter 53, Session Laws of Alaska, 1949.

BE IT ENACTED BY THE LEGISLATURE OF THE TERRITORY OF ALASKA:

Section 1. That Subsection (a), paragraphs (1), (2) and (3), and Subsections (b) and (c) of Section 51-5-10, Alaska Compiled Laws Annotated 1949, as amended by Chapter 53, Session Laws of Alaska, 1949, be and it is hereby repealed.

Appendix B

CHAPTER 83, SESSION LAWS OF ALASKA, 1953

AN ACT

(H. B. 129)

To create an Employment Security Commission of Alaska.

BE IT ENACTED BY THE LEGISLATURE OF THE TERRITORY OF ALASKA:

Section 1. There is hereby created a commission to be known as the Employment Security Commission of Alaska. The Commission shall consist of four members, who shall be appointed by the Governor, by and with the consent of the legislature, in joint session of both houses, as soon as possible after passage and approval of this Act. Members of the Commission shall be residents of the Territory of Alaska and citizens of the United States, over the age of twenty-one years. Not more than two members of the Commission shall be of the same Political Party. Two members shall be representative of industry or management and two shall be representative of labor. Each member shall hold office for a term of six years, except that:

(1) Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of that term; and if a vacancy occurs at a time when the legislature is not in session, through death, resignation, removal or disqualifica-

tion, under this Act, a new member shall be appointed by the Governor to fill the vacancy who shall have the qualifications herein prescribed and who shall hold office for the remainder of the term for which his predecessor was appointed; and

(2) The terms of office of the members first taking office after the date of the enactment of this Act shall begin on the date of their appointment and shall expire, one on February 1, 1955, one on February 1, 1957, one on February 1, 1959 and one on February 1, 1961. The members of the Commission shall be Territorial officers, and before entering upon the discharge of their duties, shall take such oaths of office as are prescribed for Territorial officers. The Governor may, at any time, after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance in office, or commission of a crime.

Upon the expiration of the term of a member, the Governor shall submit the name of a successor for confirmation by the legislature then in session; if the Governor does not submit such name, the incumbent shall continue to hold office and to perform the duties thereof until his successor shall be appointed and confirmed by the legislature, as in this section provided, and no recess or interim appointments shall be made in such cases.

(3) The Commission shall appoint a director who shall be the chief executive of the Commission, whose compensation shall be Eight Thousand Five Hundred

Dollars ($8,500.00) per annum, payable in equal monthly installments; he shall be appointed for a term of four years and may be removed at the pleasure of the Commission. No person shall be appointed Director unless he is a citizen of the United States, a resident of this Territory and has been such resident at least five years immediately preceding his appointment. The Director shall be subject to the supervision and direction of the Commission and shall perform such duties as the Commission may assign to him.

(b) One of the members of the Commission so appointed shall be chosen by all members as Chairman of the Commission. Members of the Commission shall be reimbursed for actual travel expenses and shall receive a per diem allowance for each day that they are away from home in connection with their official duties in carrying out the purpose of this Act. The reimbursement of all Commissioners shall be from the Employment Security Commission administration fund.

(c) Any three Commissioners shall constitute a quorum, and no vacancy shall impair the rights of the remaining Commissioners to exercise all the powers of the Commission.

Appendix C

SECTION 7, CHAPTER 99, SESSION LAWS OF ALASKA, 1953

Section 7. That Sec. 51-5-2 (c) ACLA 1949 is hereby repealed and a new section in lieu thereof is hereof enacted to read as follows:

(c) (1) Seasonal Employer. As used in this section the term "seasonal employer" means an employer or operating unit of an employer which because of the seasonal nature of its operations, reduces its employment to such an extent that its monthly payroll for each of three consecutive months in each of two consecutive calendar or operating years immediately preceding the year for which the determination is made, is less than one-half the average monthly payroll for the three consecutive months of highest payroll in the same calendar or operating years. No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission. A successor in interest of a seasonal employer or operating unit shall be deemed seasonal upon the same basis as the predecessor unless determined otherwise by the Commission.

(2) Seasonal Period and Duration of Determination. In establishing a seasonal period as contemplated herein, the Commission shall make such investigations and conduct such hearings as may be required, and shall use as a guide data relating to the best practices of the industry in which the employer is engaged. When the Commission has finally determined seasonal periods, it shall issue a regulation specifying the sea-

sonal periods during which benefits shall be payable to eligible beneficiaries for unemployment occurring within the benefit year affected by such regulation.

Employers affected by such regulation shall report on forms provided by the Commission the wages payable to individuals in their employ during the inclusive dates of the seasonal period set by the Commission, as distinguished from wages payable for employment before or after such seasonal period.

Prior to June thirtieth each year, a written determination declaring the employer to be seasonal and specifying the period of seasonal operation shall be forwarded to the employer involved. Notice of the determined season shall be forwarded to any representative of individuals in the employment of such employer and of whom the Commission has knowledge. Within fifteen days after the date of mailing or handing such written declaration, the employer or other interested party may appeal from such determination. An appeal shall be made to the Commission stating therein why the determination is appealed. After affording the parties a reasonable opportunity to submit briefs with respect to the determination appealed from, the Commission may affirm, modify, or set aside such determination, and such action of the Commission shall be deemed conclusive unless further appeal is initiated as provided in Section 51-5-7 (h) herein.

(3) Seasonal Employment Defined. "Seasonal employment" means all employment for a seasonal em-

ployer or operating unit within the season determined by the Commission as its operating season. All wages payable by a seasonal employer within such operating season shall be deemed seasonal wages.

(4) Operating Unit. For the purposes of this Act relating to seasonal employment, an "operating unit" is any unit of an employer's business which frequently is conducted as a separate and independent operation.

(5) Seasonal Worker. "Seasonal worker" means an individual who has base period wage credits of which at least eighty percentum have been earned in seasonal employment.

(6) Benefit Payments to Seasonal Workers. When the Commission has designated the operations of an employer or an operating unit as seasonal, then benefits shall be payable to seasonal workers employed thereby only on account of unemployment occurring during the regular period of such seasonal employment as designated in Section 51-5-2 (c) (2).